



Reaching Out

thru International Adoption, Inc.

Together...we can make a difference in the life of a child

October 28, 2003

Adoption Professionals and Others
Interested in Hague Regulations Governing
International Adoption

Re: Comments to Risk and Liability Provisions of Hague Regulations

To Whom It May Concern:

By this memorandum, we are hereby providing our comments to certain risk and liability sections of the Proposed Hague Regulations. The official comment period ends on November 14, 2003. We would ask that you consider our viewpoint as an international adoption agency in seeking certain changes to the proposed regulatory scheme.

1. Introduction

The Proposed Hague Regulations provide some excellent guidance for international adoption agencies to follow to ensure that important policies behind the Hague Adoption Convention are effected. The Hague Convention's stated policy is to protect the children, birth parents and adoptive parents involved in intercountry adoptions and to prevent child-trafficking and other abuses. On many issues, the drafters of the Regulations were on the mark in accomplishing these important goals. However, certain provisions that cover risk and liability issues directly counter certain of the goals of not only the Hague Convention, but of the Regulations themselves. While initially the adoption agencies may pay the price by increased costs or going out of business altogether, ultimately, the children of foreign nations and adoptive parents will suffer from the high costs and responsibilities heaped on the agencies, and there will likely be a chilling effect on international adoption to the benefit of no one.

The following statement in the Regulations goes right to the heart of our concerns:

In deference to the historically important role the formation of networks and the use of small agencies and persons have played in providing services ...the Department has created regulations that allow such relationships among agencies to continue. The Department's goal is to mirror current practices and to provide regulatory flexibility so that the regulations do not, negatively affect small agencies and person and other providers

Proposed Regulations, p. 54077. Notwithstanding this important recognition, the drafters propose implementation of a financial framework that endangers the agencies' very existence. Specifically, the financial framework does the following:



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- (i) Statutorily assigns all risk between adoptive parents and their agencies/service providers to the agency/service providers;
- (ii) Channels all liability of adoption service providers throughout the system to a single "primary provider;"
- (iii) Ties the agencies' hands from sharing any risk within the system with adoptive parents by prohibiting informed waiver provisions;
- (iv) Requiring \$1,000,000 per occurrence of insurance coverage; and
- (v) Incongruously, imposing non-profit status on most agencies.

With the exception of the requirement for non-profit status, imposition of any of these requirements alone would be an enormous hardship for most agencies. However, taken together, the drafters have imposed an unworkable scheme for agencies to implement.

2. Analysis

(a) Assignment of Risk between Adoptive Parents to Service Providers and Channeling of Such Liability to a Single Primary Provider

By enacting certain liability sections of the Proposed Regulations, the drafters are placing an unmanageable financial burden on the agencies that serve as primary providers. Specifically, the provisions expressly require that agency primary providers retain legal authority and "(1) assume tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted services and its compliance with the standards in this subpart F; and (2) maintains a bond, escrow account or liability insurance in an amount sufficient to cover the risks of liability arising from its work with supervised providers..." Proposed Reg. 96.45(b)(8) & (c) and 96.46(b)(9) & (c). These provisions have 2 important implications:

- (i) The provisions will channel all liability, in tort, contract or otherwise within each case to a single "primary provider" for the actions of all adoption service providers in the U.S. and abroad in the process (subject to certain limited exceptions); and
- (ii) The provisions will assign all risk that is inherent in the international adoption system to the agencies versus the adoptive parent(s), thereby creating a statutory cause of action for the adoptive parents to pursue against their agencies.

The drafters' stated goals were: (i) to "improve supervision," by American agencies over its counterparts in the U.S. and abroad, Preamble, at 54081, and (ii) to give parents "legal recourse against



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a single entity." Preamble, at 54081. The drafters' proposed solutions present enormous dangers for a number of reasons.

First, it is a known fact within the international adoption industry that agencies have little meaningful control over their foreign counterparts. In addition to obvious language and cultural barriers, many foreign agency contacts do not have access to the money, resources, health care, training, record keeping, or legal services that are in anyway comparable to those that we have in the United States. American agencies cannot reasonably be expected to visit every orphanage, attend every doctors' visit, file every paper for every child eligible for international adoption. If resources were available to help children in foreign lands to this extent, it is unlikely that there would be such an enormous need for international adoption to help the children of these nations. American agencies' chances of successfully policing their foreign counterparts is extraordinarily difficult to accomplish, and this purpose will not be furthered effectively by imposition of liability on such agencies.

Second, in relation to U.S.-based supervised providers, most of whom do only home study, parent preparation and post-placement services, the Proposed Regulations would cause accredited agencies to avoid using their services altogether. Given a choice between utilizing the services of another accredited provider for these functions and utilizing an unaccredited supervised provider, most accredited agencies would be unwilling to accept the legal responsibility and liability that using supervised providers would entail under the proposed regulatory scheme. If these small agencies and social workers (who collectively place thousands of children) are unable to procure written agreements with accredited agencies, they will surely go out of business. The drafters must recognize that these small providers are a vital link in the international adoption community, and without them, many children and adoptive parents will be lost to one another. And, ironically, these small local service providers are the only ones who can still get their own professional liability insurance coverage without difficulty since they are not involved with placing children and are almost never sued.

Third, channeling of liability to the primary provider to "improve supervision" is duplicative of other provisions in the Hague Regulations and, therefore, unnecessary. The drafters proposed a reasonable and appropriate means of encouraging supervision by expressly requiring agencies to investigate their foreign contacts, and to ensure that supervised providers here and abroad are ethical, meet certain standards, and understand and abide by the principles behind the Hague Convention. See Preamble, at 54084; Proposed Reg. Sec. 96.45(a) & 96.46(a). The Hague Regulations take the further well-justified step to require that American agencies to execute written agreements with their supervised providers in the U.S. and abroad that impose certain predefined requirements and certifications that are consistent with the Convention goals. Proposed Reg. Sec. 96.45(b) & 96.46(b). In short, absent the liability provisions, the Hague Regulations already propose a scheme for reasonable supervision which is as much as American agencies could possibly impose over their U.S.-based and foreign supervised providers - and this scheme does not endanger agencies in the manner they are impacted by the liability provisions.



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Fourth, the drafters have placed an enormous financial burden on the agencies that the agencies are in no position to assume. Most agencies are not deep pockets – they are non-profit corporations with inherently limited resources. Non-profit corporations face enough of a challenge in training and promoting responsible behavior of, and protecting themselves from the negligence of, their own employees without asking them to assume responsibility for the “local service providers” in the U.S. as well as for third party independent contractors in foreign lands.

Agencies are in business to promote the charitable purpose of “unit[ing] children living in terrible conditions in foreign orphanages with parents who want them,” Howard M. Cooper, “Enforcement of Contractual Release and Hold Harmless Language in ‘Wrongful Adoption’ Cases,” Boston Bar Journal, May/June 2000. For this reason, the state and federal government have granted such agencies non-profit status so that they can fulfill their important mission.

If anything, non-profit corporations deserve protection from liability in this already overly litigious society. For this precise reason, some states have enacted statutes that provide non-profits with immunity from liability for its own negligence. For instance, the New Jersey Charitable Immunity statute provides as follows:

No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees... shall ... be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation ... where such person is a beneficiary, to whatever degree, of the works of such nonprofit...

See e.g. N.J. 2A:53A-7. Non-profit immunity statutes codify the public policy that ensures that the dedicated staff of not for-profit corporations can accomplish their charitable purpose free of fear from litigation due to negligence. Forcing non-profit international adoption corporations to expressly assume the liability not only for their own employees but for supervised providers here and in foreign lands over whom agencies have no direct control runs counter to other non-profit policy and law and imposes an unduly heavy burden.

Fifth, the language of Sections 96.45 (c) and 96.46(c), statutorily shifts all risk undertaken by prospective adoptive parents in pursuing foreign adoption to their agencies and creates a statutory cause of action for them. These provisions will invite litigation from adoptive parents against the very agencies that are trying to help them build a family.

The predetermination of this result is expressly stated in the Preamble, which provides the purpose of these provisions is to “give the adoptive parents legal recourse against a single entity...” Preamble V(c)(6). However, why do parents need a statutory right to sue? Parents already have a right to sue and are actively using it! See Wall Street Journal, December 7, 1998, “Are Adoption Agencies Liable for Not Telling All?” In fact, these regulations will further promote litigation and,



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thereby, pit agencies against other agencies and agencies against client adoptive parents. This blame-oriented framework will ultimately destroy the mutual trust the agency community works so hard to build.

Those who advocate for recourse through litigation may suggest that the liability provisions are necessary to punish the agency so that they will seek to ensure that the event that led to a disappointing result for the adoptive parents will not reoccur. However, agencies cannot practicably control the world events, orphanage conditions, available medical equipment, unknown genetic predispositions, or any of the other risks that lead to the disappointing result in the first place. Using liability as a hammer to force agencies to improve these types of events will be excessive and ineffective.

Moreover, the drafters have already – appropriately – proposed a scheme that will ensure that agencies maintain equitable standards, ensure they work with third parties who maintain ethical standards, and be punished in the event they fail to comply with Hague standards. See Hague Regulations Subpart J. Specifically, the Proposed Regulations already contain a system that permits adoptive parents to file complaints against agencies, that ensures their timely investigation, and that permits imposition of adverse actions or other sanctions. In short, the drafters do not need to layer the liability provisions on top of this solid framework to provide for agency accountability.

Those who advocate for recourse through liability may further suggest that the liability provisions compensate the parents for economic losses resulting from the acts of the foreign coordinators. However, why should the agencies be forced to accept fiscal responsibility for all participants throughout the entire system? The agencies are serving the greater good of carrying out their charitable mission for the children of the world. If the drafters wish for parents to have a means of compensation in the event of a tragic result, there are more reasonable alternatives that can be implemented on their behalves. See Section 3, below.

Further, giving adoptive parents carte blanche to sue their adoption agencies would not only expose the agencies to enormous financial risk, but it would increase the agencies' legal and insurance costs tremendously! These tremendous costs, would, in turn, be passed on to the adoptive parents. Of course, the increased cost of higher insurance premiums presumes that we are able to acquire such a policy in the first place. Our insurance broker has advised us specifically that no carrier with which his agency works would insure for the acts of foreign independent contractors.

Finally, the flaws discussed above are not remedied by the drafters' permitting the agencies to retain the right to seek indemnification against their providers. See Proposed Regulation 96.45(d) and 96.46(d). The agencies will be long out of business before they could ever make use of these tools.



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(b) Prohibition Against Contractual Waivers

In addition to statutorily assigning all risk to agencies that normally is shared with parents, the drafters further prohibit reallocation of this risk by contract. Specifically, the Regulations state "the agency or person [may] not require a client or prospective client to sign a blanket waiver of liability in connection with the provision of adoption services in Convention cases." Section 96.39(d).

It is currently standard practice for agencies to advise their clients that international adoption is not a risk-free means of growing their families. Agencies advise the adoptive parents at the outset of the process that they will be working in a foreign country, with a foreign government, foreign language, foreign culture, foreign medical systems and will be subject to the unknowns of foreign law and custom. We all run the risk of countries spontaneously deciding to close their adoption programs. Moreover, agencies cite the universal risk of developmental delays in orphanage children and the possibility of unknown or undiagnosed medical and psychological conditions of the children due to factors beyond their control. After acknowledging the possible hurdles and roadblocks, many prospective adoptive parents choose to proceed despite the known obstacles. And agencies reasonably ask parents to forego suing the agency if any of the risks becomes a reality.

Once again, the drafters have altered current practice substantially, and prohibited adoption agencies from protecting themselves in this abundantly reasonable manner. Simply stated, to be able to survive as a business, agencies must be able to share the risk and to protect themselves contractually from the threat of litigation by adoptive parent(s). Why should agencies be prohibited from educating their clients about the inherent risks and asking them to decide whether they wish to proceed. As stated in an article on this topic:

In a litigious society such as ours, the ability of an agency to educate prospective parents about the risks of international adoption and then to ask them to accept those risk is indispensable to an agency's ability to carry out its charitable purpose...Put simply, the risks are multiple and known; and absent an ability to require prospective adoptive parents to a voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children.

Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in Wrongful Adoption Cases," Boston Bar Journal May/June 2000.

Imposition of a statutory prohibition such as that proposed in the Regulations is inappropriate interference with well-justified business practice. This principle has been recognized by various courts who have determined that exculpatory provisions in this precise context are appropriate and consistent with public policy. See Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000 (citing *Forbes v. The Alliance for Children, Inc., et al*, Suffolk County, Civil Action No. 97-04869B; *Regensburger v. China*



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Adoption Consultant Ltd., 138 F.3d 1201 (7th Cir. 1999); French v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd, No. 97-7167 (D. D.C. Cir. Sept. 10, 1998)).

(c) Insurance Requirements

The Regulations further propose a prohibitively high amount of insurance coverage - \$1 million per occurrence. Proposed Reg. Sec. 96.33(h). This is inappropriate for several reasons. First, it is already impossible for many agencies to procure professional liability coverage. Our agency has been seeking to renew or purchase a policy for several weeks and we have been met with denials notwithstanding our excellent service record and broad charitable immunity available in our home state. (See letter from insurance broker attached hereto).

Second, the level of \$1 million is extraordinarily high given the type of compensatory damages most parents could seek. Adoption expenses will rarely rise above \$30,000, and much of these expenses are now set off against government tax credits and employer contribution benefits. Adoption agencies are not performing surgery. This high floor is unnecessary.

Third, we reiterate our comment that the drafters are inviting litigation from adoptive parents who otherwise would not have such a large policy to pursue. The proposed liability statute, coupled with the high level of insurance coverage, will open the floodgates to litigation by parents seeking to pursue a deep pocket due to their disappointing experience. Wrongful adoption suits based on the Hague Regulations could become the next automobile personal injury for the legal community, which could mire agencies in a future of unlimited and groundless lawsuits.

(d) Additional Comments

We appreciate the encouragement of the Department of State to provide the agency point of view on these issues. The sections of the Regulations discussed herein strongly suggest to us that the drafters of certain of the Proposed Regulations have served as the sounding board for advocates of certain adoptive parents who were "victimized" by unethical international adoption agencies. Like every industry, the international adoption agencies have their bad apples and war stories. We all recognize them and are ashamed when our colleagues give into greed or dishonesty when dealing with vulnerable adoptive parents.

We would, however, respectfully ask the Department of State to also factor into its assessment the real world circumstances the agencies are being asked to police. Indeed, the same circumstances that lead to children becoming available for international adoption create the inherent risk in the process, such as birthmothers abandoning children due to extreme poverty, lack of adequate care and/or ability to receive and provide care for a child - usually with some degree of substandard both pre and post natal care/nutrition, possible undiagnosed genetic conditions, etc. The term "abandonment" alone dictates that often very little information may be known about a child's medical



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history or genetic disposition. Orphanage workers are usually not skilled, trained medical professionals, but often volunteers or low-paid labor providing basic care only. Orphanages staff spend their time and resources in meeting the basic life-sustaining needs of the children and are usually ill-equipped to focus on extensive and accurate medical evaluations and diagnosis. In many instances, adequate testing to determine true levels of physical, development and/or emotional delays is not readily available in third world countries, too cost-prohibitive for underfunded orphanages, or is viewed as an unnecessary expense to waste on the country's unwanted children. These are the real world circumstances that agencies and adoptive families face everyday and why agencies rely upon informed waiver provisions as an appropriate means to move forward in accomplishing their missions.

We would further respectfully ask that the Department of State to consider the precarious position of agencies in relation to the adoptive parents. The adoptive parents may come to the process influenced negatively by other factors that have nothing to do with their agency. As one author stated:

Passions run high in these [wrongful adoption] cases. Often, they... involve parents whose emotions were already rubbed raw by not being able to have their own children. Many then faced a legal obstacle course to adopt. Gradually realizing that their long-awaited child has physical or mental problems can be the last straw, emotionally. What's more, to prove their case [against their agency], parents must often argue that they would not have adopted the children if they had known the truth.

Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?" cited in Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000. Arming emotionally-charged parents with a target for their blame and despair will only fuel the litigation crisis further and lead to a counter-productive result.

The international adoption agency community would like the Department of State to recognize that the vast majority of us are in this industry for the right reasons – to bring together children living as orphans in dangerous conditions in foreign lands with able parents who want to nurture them. And we are proud to report that that the success stories far outweigh the tragedies. In fact, considering that international adoption has brought almost 160,000 children to the United States for adoption from foreign countries since 1989, the tragedies are remarkably few. See State Department Website, http://travel.state.gov/orphan_numbers.html.

We believe that the proposed liability structure of the Hague Regulations will throw the baby out with the bathwater and go far beyond, and run counter to, the purpose of the Hague Convention. It will not only prevent the tragedies but it will destroy the ability of Americans who seek to grow their families through adoption to do so because they can't afford the cost of the few agencies that were able to stay in business. And, of course, imposition of these impossible standards will have a tragic effect on the very children who the agencies, and the drafters of the Hague legislation, seek to help.



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3. Proposed Alternative Solutions

The Hague Regulations can accomplish the purpose of the Hague Convention, and even some of the new purposes that apparently were added when drafting the Hague Regulations, by striking the following provisions:

- (i) Strike sections 96.45(b)(8) & (c) and 96.46(b)(9) & (c) – These are the key provisions which assign all risk between adoptive parents and their service providers to the service providers, and channel that liability to the primary providers;
- (ii) Strike section 96.39(d), which ties the agencies hands from sharing any risk within the process with adoptive parents by prohibiting informed waiver provisions. Waiver provisions should be permissible if the agencies educate their clients about known risks and parents knowingly decide to undertake such risk; and
- (iii) Strike section 96.33(h) - Requiring \$1,000,000 per occurrence of insurance coverage. Insurance should not be a requirement unless the Department of State can propose a reasonable amount of coverage that is reasonably related to compensatory damages and will not encourage litigation, and until the Department of State can guaranty the availability and affordability of such policies.

As stated previously, the justifications for these provisions are accomplished effectively and appropriately by other provisions in the Regulations. The requirements of sections 96.45 and 96.46 (without sections 96.45(b)(8) and (c) and 96.46(b)(9) and (c)) accomplish effectively the drafters' desire to gain control and supervision over supervised providers here and abroad. The provisions are bolstered by Subsection J, which demands that all agencies conduct themselves with the highest of standards or risk losing their reputations or, worse, their licenses and/or accreditation.

The requirement for insurance coverage and prohibition against waivers forces the agencies to accept substantial risk that could effectively be spread throughout others in the process. Parents should be able to make a knowing decision that they can or cannot afford to accept known risks. Agencies should be able to pursue their charitable purposes without the threat of constant litigation.

As alternatives to retain some of the protections that the drafters proposed by the stricken provisions, we propose that the drafters ask the insurance industry to analyze underwriting international adoption insurance policies for parents to individually defray the known risks of international adoption. Insurers cover domestic adoption risks, as well as travel insurance risks. It is not a far stretch for insurance companies to cover the risks associated with foreign adoption and not



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unreasonable to ask that the parents pay insurance premiums if they want the added protection from financial loss in the event of a disappointing result.

Finally, to the extent that the drafters wish to create some scheme that would allow financial compensation in the event of a tragic result, we believe that the agencies, under the administration of the State Department or some other governing body, might develop and implement a claims mechanism similar to what is used by other professionals in other industries. For example, many state bar associations have a Lawyers' Fund For Client Protection. Law firms remit annual "dues" and, basically, commit a predefined amount of resources to cover the misdeeds of the dishonest lawyer in the community. Of course, there would need to be a claims process that would require the claimant adoptive parent to demonstrate need, and a governing body to determine if the standards are met. But this may be a compromise with which the industry, the adoptive parents, and the needy children of the world can actually live.

Respectfully submitted,

Reaching Out thru International Adoption

Deborah E. Spivack, Esquire
Executive Director

Jeannene Smith, Founder



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Appendix

I. Section References:

- a. Preamble V(c)(3). Subpart C – Accreditation and Approval –
 - i. Pg – 54077- In deference to the historically important role the formation of networks and the use of small agencies and persons have played in providing services ...the Department has created regulations that allow such relationships among agencies to continue. The Department's goal is to mirror current practices and to provide regulatory flexibility so that the regulations do not negatively affect small agencies and person and other providers... sections 96.45(c) and 96.46(c) is that a primary provider must assume legal responsibility for the actions of supervised providers, both in the United States and overseas... (emphasis added).
- b. Preamble V(c) (6) – Subpart F – Standards for Convention Accreditation and Approval
 - i. Pg - 54081 – "...Input from congressional staff called for the regulations to assign civil liability to the accredited/approved provider for the acts of its U.S. supervised providers and its foreign supervised providers. To address these concern, the regulations made in sections 96.45(c) and 96.46(c) that any accredited agency, temporarily accredited agency, or approved person acting as the primary provider assume legal responsibility vis-à-vis the adoptive parents for the acts of other agencies and persons in the United States or abroad acting under its supervisions and responsibility, in addition to its own acts in connection with an adoption. The intend of this provision is to give the adoptive parents legal recourse against a single entity so far as is reasonable. The Department recognizes that this provision may raise the costs of liability insurance for accredited agencies and approved persons and have an effect on civil litigation. The Department is satisfied, however, that it is consistent with the intent and overall purpose of the IAA..." (emphasis added)
 - ii. Pg 54082 – "...It seems also appropriate that, in tort, contract or similar legal action in which the performance of an adoption service provider is challenged, the primary provider should assume legal responsibility for the acts of supervised providers (domestic and foreign) that it has chosen to work with. The Department believes that the primary provider will do a better job of supervising if it is deemed automatically to be legally responsible for the acts of its supervised providers in both the accreditation and approval contact and with respect to tort, contract and similar civil claims."



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- iii. Pg. 54082 – The regulations require the agency or person to have a professional assessment of the risks it assumes, including the risk of assuming legal responsibility for the supervised providers in the United States and abroad, and to carry an amount of insurance that is reasonable related to that risk but in no event less than one million dollars per occurrence or claim. (emphasis added)
 - iv. Pg 54084 – This Preamble does not review all of the requirements contained in these sections, but generally the primary provider must... (1) Screen supervised providers to ensure that they have a general understanding of the Convention and its requirements; (2) before entering into an agreement for the provision of adoption services, obtain information about the supervised provider's history of practice and suitability to provider services consonant with the Convention..."
 - v. Pg 54084 – The primary provider is responsible for ensuring that the supervised providers with whom it chooses to work comply with these requirements. Failure to do so may be grounds for adverse action against the primary provider and may jeopardize its accreditation or approval status. (emphasis added).
 - c. Subpart F – Standards for Convention Accreditation and Approval
 - i. Section 96.33(h) – Budget, audit insurance and risk assessment requirements
 - ii. Teamleader – Michael Phenner –
 - iii. "The agency or person maintains insurance in amounts reasonably related to its expose to risk, including the risks of providing services through supervised providers, but in no case in an amount less than \$1,000,000 per occurrence."
 - d. Subpart F – Standards for Convention Accreditation and Approval
 - i. Section 96.39(d) – Information disclosure and quality control practices
 - ii. Pg - 54103 – "The agency or person [may] not require a client or prospective client to sign a blanket waiver of liability in connection with the provision of adoption services in Convention cases."
 - e. Subpart F - Standards for Convention Accreditation and Approval
 - i. Section 96.45(b)(8) and (c)(1) -
 - ii. pg - 54105 – "the agency... when acting as the primary provider and using supervised providers to provide adoption services, ensures that each supervised provider "operates under a written agreement with the primary provider that ... provides that the primary provider will retain legal responsibility for each case in which adoption services are provided, as required by paragraph (c)..."
- c – The Agency or person, when acting as the primary provider and using supervised providers in the United States to provide adoption services, does the



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following in relation to risk management: (1) assumes tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted services and its compliance with the standards in this subpart F; and (2) maintains a bond, escrow account or liability insurance in an amount sufficient to cover the risks of liability arising from its work with supervised providers... (emphasis added).

f. Subpart F – Standards for Convention Accreditation and Approval

i. Section 96.46(b)(9) and (c)

- ii. Pg - 54106 – "...The agency ...when acting as the primary provider and using foreign supervised providers to provide adoption services in other Convention countries, ensures that each foreign supervised provider operates under a written agreement with the primary provider that "provides that the primary provider will retain legal responsibility for each case in which adoption services are required, as required by paragraph © of this section

(c) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in other Convention countries, does the following in relation to risk management: (1) Assumes tort, contract and other civil liability to the prospective adoptive parent(s) for the foreign supervised provider's provision of the contracted adoption services and its compliance with the standards in this subpart F; and (2) Maintains a bond, escrow account or liability insurance in an amount sufficient to cover the risks of liability arising from its work with foreign supervised providers."

n: debbie@adoptachild.us
t: Monday, December 01, 2003 1:06 PM
To: adoptionregs@state.gov
Subject: Docket number State/AR-01/96



Hague Letter from
ROTIA -.doc

Attached please find a final copy of our comments to the Proposed Regulations concerning international adoption. We will send additional hardcopies to you by Federal Express.

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December 2, 2003

U.S. Department of State
CA/OCS/PRI
Adoption Regulations Docket Room, SA-29
2201 C Street, NW
Washington, DC 20520

Re: Docket State/AR-01/96: Comments to Risk and
Liability Provisions of Hague Regulations

To Whom It May Concern:

Reaching Out thru International Adoption ("Reaching Out"), a non-profit international adoption and humanitarian aid organization, hereby submits its comments to certain provisions of the Proposed Hague Regulations (the "Proposed Regulations"). The Proposed Regulations provide some excellent guidance for international adoption agencies to follow to ensure that important policies behind the Hague Adoption Convention are accomplished. However, we are extremely troubled by the impact of the risk and liability provisions that are proposed. Therefore, we have devoted the majority of our comments to those points. In addition, we address certain additional important issues to a lesser extent following our risk and liability analysis. We respectfully request that the U.S. Department of State consider our serious concerns in seeking certain changes to the proposed regulatory scheme.

I. Risk and Liability Provisions

A. Introduction

The Hague Convention's stated policy is to protect the children, birth parents and adoptive parents involved in intercountry adoptions and to prevent child-trafficking and other abuses. On many issues, the drafters of the Regulations were on the mark in accomplishing these important goals. However, certain provisions relating to risk and liability issues directly counter certain of the goals of not only the Hague Convention, but of the Regulations themselves. While initially the adoption agencies may pay the price by increased costs or going out of business altogether, ultimately, the children of foreign nations and adoptive parents will suffer from the high costs and responsibilities heaped on the agencies, and there will likely be a chilling effect on international adoption. Ironically, the Regulations, as currently drafted, undermine the very purpose that the drafters of the Hague legislation sought in good faith to accomplish.

The following statement in the Regulations goes right to the heart of our concerns:

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"In deference to the historically important role the formation of networks and the use of small agencies and persons have played in providing services ...the Department has created regulations that allow such relationships among agencies to continue. The Department's goal is to mirror current practices and to provide regulatory flexibility so that the regulations do not negatively affect small agencies and persons and other providers."

Preamble, p. 54077. Notwithstanding this important recognition, the drafters propose implementation of a financial framework that goes far beyond the scope of the legislation and endangers the agencies' very existence. Specifically, the financial framework does the following:

- (i) Channels all liability of adoption service providers throughout the system to a single "primary provider;"
- (ii) Statutorily assigns all risk between adoptive parents and their agencies/service providers to the agency/service providers;
- (iii) Ties the agencies' hands from sharing any risk within the system with adoptive parents by prohibiting informed waiver provisions;
- (iv) Requires maintenance of \$1,000,000 per occurrence of insurance coverage; and
- (v) Incongruously, imposes non-profit status on most agencies.

With the exception of the requirement for non-profit status, imposition of any of these requirements alone would be an enormous hardship for most agencies. However, taken together, the drafters have imposed an impossible scheme for agencies to implement.

B. Analysis

1. Assignment of Risk between Adoptive Parents to Service Providers and Channeling of Such Liability to a Single Primary Provider

By enacting certain liability sections of the Proposed Regulations, the drafters are placing an improper and unmanageable financial burden on the agencies that serve as primary providers. Specifically, the provisions expressly require that agency primary providers retain legal authority and "(1) assume tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted services and its compliance with the standards in this subpart F..." Proposed Reg. 96.45(b)(8) & (c) and 96.46(b)(9) & (c). These provisions have 2 important implications:



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(i) The provisions will channel all liability, in tort, contract or otherwise within each case to a single "primary provider" for the actions of all adoption service providers in the U.S. and abroad in the process (subject to certain limited exceptions); and

(ii) The provisions will assign all risk that is inherent in the international adoption system to the agencies versus the adoptive parent(s), thereby creating a statutory cause of action for the adoptive parents to pursue against their agencies.

It is clear on their face that the proposed Regulations are creating a strict liability framework. Reaching Out respectfully submits that creation of the proposed framework exceeds the authority of the Department of State as it reaches far beyond the legislation it purports to implement, and that such a framework presents enormous dangers for the future of international adoption.

a. Implementation of the Strict Liability Framework Exceeds the Authority of the State Department.

First, Reaching Out respectfully submits that implementation of the proposed risk and liability framework in section 96.45(c)(1) and 96.46(c)(1) goes far beyond the scope of the Hague Convention Treaty and the Intercountry Adoption Act of 2000 (the "IAA") and that the State Department would be exceeding its authority to implement such a structure. Specifically, the Hague Convention, ensuing legislation and implementing regulations have a specific mandate – to protect children, birth parents and adoptive parents from abuse and child trafficking. To accomplish this important goal, the IAA requires the following: designation of the State Department as the Central Authority to oversee the accreditation and approval process; establishment of a case registry, reporting of adoption data to Congress; designation of requirements and standards for agencies to follow; establishment of a scheme of suspension, cancellation, non-renewal, debarment or punishment in the event certain deficiencies exist or violations occur; standardization of a system for recognition of foreign adoptions; amendment of the Immigration Nationality Act to assist families with visas for their children; and implementation of safeguards for child protection; preservation of records. To effect this framework, the State Department was asked to issue the Proposed Regulations to do the following: set out the requirements to select accrediting entities, specify the standards to be met by agencies and individuals providing adoption services in Hague countries, and set out the procedures to be followed for Hague Convention cases.

The majority of the proposed regulations accomplish this mandate successfully and properly within the scope of the IAA; however, certain risk and liability provisions exceed far beyond permissible boundaries. Specifically, the proposed regulations require that agencies "assume[] tort, contract, and other civil liability to the prospective adoptive parents for the ... supervised provider's provisions of the contracted adoption services and its compliance with the standards in this subpart F."



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See 96.45(c)(1) & 96.46(c)(1). This language creates a strict liability scheme,¹ as it requires that accredited agencies that are primary providers be held financially responsible for all risks within the international adoption process without regard to their fault.²

Under standard principles of common law evolved over the decades, a plaintiff must demonstrate that a defendant was negligent in order to hold such defendant legally responsible for resulting damages.³ Such plaintiff must prove the defendant's negligence by a preponderance or greater weight of the credible evidence standard and that such negligence was a proximate cause of the incident that caused the alleged damage.⁴ The Proposed Regulations alter basic principles of tort law by removing the need for adoptive parents to demonstrate any fault whatsoever on the part of their accredited agency in order to collect a judgment. Adoptive parents need merely assert a claim for damages incurred to collect against their accredited agency. Indeed, the proposed scheme would bestow upon parents a greater legal guarantee than they would have if their adopted child had been conceived biologically.

Creation of a strict liability scheme is a public policy decision vested solely in the legislative branch of government - Congress. The legislative process and accountability are the cornerstones of the democratic process which justify Congress' role as a lawmaker. Congress, an elected body of officials accountable to their constituents, alone has the authority and accountability to dictate public policy. If we as constituents are unhappy with policy determinations of our elected officials, we make

¹ Strict liability is generally defined as liability for injury to others without regard to fault or negligence, arising from inherently dangerous activities (which may have economic or social value). It also may apply to defective or unreasonably dangerous products, provided the product reaches or affects the injured person without having been altered by another.

² The Proposed Regulations are actually more severe than strict liability standards that have been passed by legislatures in other legal contexts since they extend beyond the actions of the primary provider agency. Under the proposed scheme, primary provider agencies are to be held legally accountable for actions that were performed by persons in foreign countries who were not under the direct or indirect control of the primary provider agency and without regard to any fault by such third parties. See Section 2, below.

³ Negligence is defined as a failure to exercise in the given circumstances that degree of care for the safety of others which a reasonably prudent person would exercise under the same or similar circumstances. Negligence may be the doing of an act which the reasonably prudent person would not have done, or it may be the failure to do that which the reasonably prudent person would have done under the circumstances then existing. Negligence is a departure from that standard of care.

⁴ By proximate cause it is meant that the negligent conduct of a party was an efficient cause of the accident, that it necessarily set the other causes in motion and naturally and probably led to the accident in question.



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our voices heard at the voting booth. Unlike the legislative process, rulemaking by administrative agencies does not involve the collaborative effort of elected officials but the views of officials appointed by other branches of government. Accordingly, administrative agencies do not have the authority to dictate public policy, but rather to expound upon public policy already established by Congress. Accord Chambers v. St. Mary's School, 697 N.E.2d 198 (Ohio 1998). Reaching Out respectfully submits that the State Department's proposal and adoption of regulations that create a strict liability standard is an unconstitutional usurpation of legislative authority.

b. The Risk and Liability Provisions Have Disastrous Implications for the Future of International Adoption

The drafters' stated goals in proposing the risk and liability provisions of the proposed Regulations were: (i) to "improve supervision," by American agencies over its counterparts in the U.S. and abroad, Preamble, at p. 54081, and (ii) to give parents "legal recourse against a single entity." Preamble, at 54081. The drafters' proposed solutions present enormous dangers for a number of reasons.

First, the proposed liability framework will not cause primary provider agencies to improve supervision over their U.S.-based supervised homestudy agencies. Rather, primary provider agencies will avoid using supervised provider agencies who do only home study, parent preparation and post-placement services altogether. Given a choice between utilizing the services of another accredited provider for these functions and utilizing an unaccredited supervised provider, most accredited agencies would be unwilling to accept the legal responsibility and liability that using supervised providers would entail under the proposed regulatory scheme. If these small agencies and social workers (who collectively place thousands of children) are unable to procure written agreements with accredited agencies, they will surely go out of business. The drafters must recognize that these small providers are a vital link in the international adoption community, and without them, many children and adoptive parents will be lost to one another. And, ironically, these small local service providers are the only ones who can still get their own professional liability insurance coverage without difficulty since they are not involved with placing children and are almost never sued. See Section I(B)(3) below (Insurance Requirements).

Second, imposition of liability on primary provider agencies will not improve supervision over foreign contacts. Agencies have little meaningful control over the events in foreign lands that can cause a problem with an adoption case to arise. In addition to obvious language and cultural barriers, many foreign agency contacts do not have access to the money, resources, health care, training, record keeping, or legal services that are in anyway comparable to those that we have in the United States. American agencies cannot be present for every abandonment in order to seek birth parent background and medical information or ask about their pre-natal care, nor can they visit every orphanage, supervise every doctors' visit, and file every paper for every child eligible for international adoption. If resources were available to help children in foreign lands to this extent, there would not be such an enormous



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need for international adoption to help the children of these nations to find homes in the first place. American agencies' chances of successfully policing the events in foreign lands and their foreign counterparts is extraordinarily difficult to accomplish, and this purpose will not be accomplished effectively by imposition of an extraordinary level of liability on American primary provider agencies.

Moreover, improvement of supervision over foreign contacts is more appropriately accomplished elsewhere in the Hague Regulations and, therefore, the liability provisions are duplicative in purpose, unnecessary and excessive. Specifically, the drafters proposed a reasonable and appropriate means of encouraging supervision by expressly requiring agencies to investigate their foreign contacts, and to ensure that supervised providers here and abroad are ethical, meet certain standards, and understand and abide by the principles behind the Hague Convention. See Preamble, at 54084; Proposed Reg. Sec. 96.45(a) & 96.46(a). The Hague Regulations take the further well-justified step of requiring that American agencies execute written agreements with their supervised providers in the U.S. and abroad that impose certain predefined requirements and certifications that are consistent with the Convention goals. Proposed Reg. Sec. 96.45(b) & 96.46(b). In short, absent the liability provisions, the Hague Regulations already propose a scheme for reasonable supervision which American agencies can reasonably and effectively impose over their U.S.-based and foreign supervised providers, and this scheme does not endanger agencies in the manner they are impacted by the liability provisions.

Third, the drafters have placed an enormous financial burden on the agencies that the agencies are in no position to assume. Most agencies are not deep pockets - they are non-profit corporations with inherently limited resources. Non-profit corporations face enough of a challenge in training and promoting responsible behavior of, and protecting themselves from the negligence of, their own employees without asking them to assume responsibility for the "local service providers" in the U.S. as well as for third party independent contractors in foreign lands.

Agencies are in business to promote the charitable purpose of "unit[ing] children living in terrible conditions in foreign orphanages with parents who want them," Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000. For this reason, the state and federal government have granted such agencies non-profit status so that they can fulfill their important mission.

If anything, non-profit corporations deserve protection from liability in this already overly litigious society. In recognition of this policy, some states have enacted statutes that provide non-profits with immunity from liability for its own negligence. For instance, the New Jersey Charitable Immunity statute provides as follows:

"No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees... shall ... be liable to respond in



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damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation ... where such person is a beneficiary, to whatever degree, of the works of such nonprofit..."

See N.J. 2A:53A-7. Non-profit immunity statutes codify the public policy that ensures that the dedicated staff of not for-profit corporations can accomplish their charitable purpose free of fear from litigation due to negligence. Forcing non-profit international adoption corporations to expressly assume the liability not only for their own employees but for supervised providers here and in foreign lands over whom agencies have no direct control runs counter to other non-profit policy and law and imposes an extraordinarily heavy burden.

Fourth, the language of Sections 96.45(c) and 96.46(c), statutorily shifts all risk undertaken by prospective adoptive parents in pursuing foreign adoption to their agencies and creates a statutory cause of action for them. See section 1(b)(1)(a), above. This strict liability standard will surely invite litigation from adoptive parents against the very agencies that are trying to help them build a family.

The predetermination of this result is expressly stated in the Preamble, which provides the purpose of these provisions is to "give the adoptive parents legal recourse against a single entity..." Preamble V(c)(6). Neither this purpose nor the means of achieving it are appropriate or necessary - adoptive parents do not need a statutory right to sue. They already have a right to sue and are actively using it! See Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?" These regulations will promote litigation and, thereby, pit agencies against other agencies and agencies against client adoptive parents. This blame-oriented framework will ultimately destroy the mutual trust the agency community works so hard to build. And Reaching Out respectfully submits that while the rest of the country is seeking tort reform and limitations on damage awards, any government policy that expressly seeks to promote litigation is misplaced.

Those who have advocated for recourse through litigation may suggest that the liability provisions are a necessary and appropriate means of punishing agencies so that they will seek to ensure that the event that led to a disappointing result for the adoptive parents will not reoccur. However, as stated previously, agencies cannot practicably control the world events, orphanage conditions, available medical equipment, unknown genetic predispositions, or any of the other risks that lead to the disappointing result in the first place. Using liability as a hammer to force agencies to improve these types of events will be excessive and ineffective.

Moreover, the drafters have already - appropriately - proposed a scheme that will ensure that agencies maintain equitable standards, ensure they work with third parties who maintain ethical standards, and be punished in the event they fail to comply with Hague standards. See Hague Regulations Subpart J, K and M. Specifically, the Proposed Regulations already contain a system that permits adoptive parents to file complaints against agencies, that ensures their timely investigation, and that permits imposition of adverse actions or other sanctions. The drafters do not need to layer the



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liability provisions on top of this solid framework to provide for agency accountability any more than states need to upgrade sentencing standards from life imprisonment to the death penalty in order to deter crime.

Those who advocate for recourse through liability may further suggest that the liability provisions are an appropriate mechanism to compensate the parents for economic losses resulting from the acts of the foreign coordinators. However, why should the agencies be forced to accept fiscal responsibility for all participants throughout the entire system? The agencies are serving the greater good of carrying out their charitable mission of finding homes for the orphaned children of the world. If the drafters wish for parents to have a means of compensation in the event of a tragic result, more reasonable alternatives exist. See Section I (C), below (Alternative Solutions).

Further, giving adoptive parents carte blanche to sue their adoption agencies would not only expose the agencies to enormous financial risk, but it would increase the agencies' legal and insurance costs tremendously! These tremendous costs, would, in turn, be passed on to the adoptive parents and further increase the cost of their adoption substantially. See Section II(B), below (Costs).

Of course, the increased cost of higher insurance premiums presumes that we are able to acquire such a policy in the first place. Our insurance broker has advised us specifically that no carrier with which his agency works would insure for the acts of foreign independent contractors. For a further discussion of insurance issues, see Section I(B)(3) below (Insurance Requirements).

Finally, the flaws discussed above are not remedied by the drafters' permitting the agencies to retain the right to seek indemnification against their providers. See Proposed Regulation 96.45(d) and 96.46(d). The agencies will be long out of business before they could ever make use of these tools.

2. Prohibition Against Contractual Waivers

In addition to statutorily assigning all risk to agencies that normally is shared with parents, the drafters further prohibit reallocation of this risk by contract. Specifically, the Regulations state "the agency or person [may] not require a client or prospective client to sign a blanket waiver of liability in connection with the provision of adoption services in Convention cases." Section 96.39(d).

It is currently standard practice for agencies to advise their clients that international adoption is not a risk-free means of growing their families. Agencies advise the adoptive parents at the outset of the process that they will be working in a foreign country, with a foreign government, foreign language, foreign culture, foreign medical systems and will be subject to the unknowns of foreign law and custom. We all run the risk of countries spontaneously deciding to close their adoption programs. Moreover, agencies cite the universal risk of developmental delays in orphanage children and the possibility of unknown or undiagnosed medical and psychological conditions of the children due to factors beyond their control. After acknowledging the possible hurdles and roadblocks, many



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prospective adoptive parents choose to proceed despite the known obstacles. And agencies reasonably ask parents to forego suing the agency if any of the risks becomes a reality.

Once again, the drafters have altered current practice substantially, and prohibited adoption agencies from protecting themselves in this abundantly reasonable manner. Simply stated, to be able to survive as a business, agencies must be able to share the risk and to protect themselves contractually from the threat of litigation by adoptive parent(s). Why should agencies be prohibited from educating their clients about the inherent risks and asking them to decide whether they wish to proceed? As stated in an article on this topic:

"In a litigious society such as ours, the ability of an agency to educate prospective parents about the risks of international adoption and then to ask them to accept those risk is indispensable to an agency's ability to carry out its charitable purpose...Put simply, the risks are multiple and known; and absent an ability to require prospective adoptive parents to a voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children."

Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in Wrongful Adoption Cases," Boston Bar Journal May/June 2000.

Imposition of a statutory prohibition such as that proposed in the Regulations is inappropriate interference with well-justified business practice. This principle has been recognized by various courts who have determined that exculpatory provisions in this precise context are appropriate and consistent with public policy. See Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000 (citing Forbes v. The Alliance for Children, Inc., et al, Suffolk County, Civil Action No. 97-04869B; Regensburger v. China Adoption Consultant Ltd., 138 F.3d 1201 (7th Cir. 1999); French v. World Child, Inc., 977 F. Supp. 56 (D.D.C. 1997), aff'd, No. 97-7167 (D. D.C. Cir. Sept. 10, 1998)).

3. Insurance Requirements

The Regulations further mandate coverage at a prohibitively high amount of insurance coverage - \$1 million per occurrence. Proposed Reg. Sec. 96.33(h). This is inappropriate for several reasons. First, it is already impossible for many agencies to procure professional liability coverage. Our agency has been seeking to renew or purchase a policy for several weeks and we have been met with denials notwithstanding our excellent service record, well-drafted contract, and broad charitable immunity available in our home state. The level of \$1 million may be impossible to satisfy depending on cost and whether insurers will once again begin to underwrite this type of policy.

Second, if the Proposed Regulations specify a minimum of \$1 million, this will encourage litigious clients and their attorneys to sue for this specific high amount, knowing that it is available even though it will far exceed the client's out of pocket costs (rarely higher than \$40,000) and/or medical bills for



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almost any child. The combination of this high floor of insurance coverage and the proposed risk and liability provisions described in sections (a) and (b) above will open the floodgates to litigation and mire agencies in a future of unlimited and groundless lawsuits.

Third, Reaching Out submits that there are more effective tools available to provide a safety net for adoptive parents if an unforeseen event occurs and they suffer a loss. See Section I(C), below (Proposed Alternative Solutions).

4. Additional Comments Concerning Risk and Liability Provisions

We appreciate the encouragement of the Department of State to provide the agency point of view on these issues. The sections of the Regulations discussed herein strongly suggest to us that the drafters of certain of the Proposed Regulations have served as the sounding board for advocates of a vocal minority of adoptive parents who either experienced a disappointing result or were truly victimized by unethical international adoption agencies. Like every industry, the international adoption industry has its bad apples and war stories. We all recognize them and are ashamed when our colleagues give into greed or dishonesty when dealing with adoptive parents during this important and vulnerable period of their lives.

We would, however, respectfully ask the Department of State to also factor into its assessment the real world circumstances that the legitimate agencies are now being asked to police. Indeed, the same circumstances that lead to children becoming available for international adoption create the inherent risk in the process about which the Department now complains. Agencies can not change the fact that birthmothers feel forced to abandon their children due to extreme poverty, or that a country does not have the resources to provide adequate care for its young, or that a birthmother mother had some degree of substandard pre or post natal care/nutrition, or possible undiagnosed genetic conditions. The term "abandonment" alone dictates that often very little information may be known about a child's medical history or genetic disposition. Orphanage workers are usually not skilled, trained medical professionals, but often volunteers or low-paid labor providing basic care only. Orphanages staff spend their time and resources in meeting the basic life-sustaining needs of the children and are usually ill-equipped to focus on extensive and accurate medical evaluations and diagnosis. In many instances, adequate testing to determine true levels of physical, development and/or emotional delays is not readily available in third world countries, too cost-prohibitive for underfunded orphanages, or is viewed as an unnecessary expense to waste on the country's unwanted children. These are the real world circumstances that agencies and adoptive families navigate everyday. Agencies will not suddenly become empowered to bring third world countries up to the medical and practical standards of the western world by a burdensome strict liability scheme.

We would further respectfully ask that the Department of State consider the precarious position of agencies in relation to the adoptive parents. As one author stated:



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"Passions run high in these [wrongful adoption] cases. Often, they... involve parents whose emotions were already rubbed raw by not being able to have their own children. Many then faced a legal obstacle course to adopt. Gradually realizing that their long-awaited child has physical or mental problems, can be the last straw, emotionally. What's more, to prove their case [against their agency], parents must often argue that they would not have adopted the children if they had known the truth."

Wall Street Journal, December 7, 1998, "Are Adoption Agencies Liable for Not Telling All?" cited in Howard M. Cooper, "Enforcement of Contractual Release and Hold Harmless Language in 'Wrongful Adoption' Cases," Boston Bar Journal, May/June 2000. Arming emotionally-charged parents with a target for their blame and despair will only fuel the litigation crisis further and lead to a counter-productive result.

The international adoption agency community would like the Department of State to recognize that the vast majority of us are in this industry for the right reasons - to bring together children living as orphans in dangerous conditions in foreign lands with able parents who want to nurture them. And we are proud to report that the success stories far outweigh the tragedies. In fact, considering that international adoption has brought almost 160,000 children to the United States for adoption from foreign countries since 1989, the tragedies are remarkably few. See State Department Website, http://travel.state.gov/orphan_numbers.html.

Moreover, we would like the Department of State to consider the broad-sweeping ramifications of a scheme that will chill international adoption. International adoption improves not only the lives of adoptive parents and the adoptees, but those of the millions of children who remain in the orphanages around the world. Because of donations by adoptive parents to their adopted children's orphanages and communities, and the humanitarian aid projects that international adoption agencies such as ours sponsor with the support of our wonderful and generous families, the orphanages receive greater resources for medicine, medical care, bedding, clothes, food and education. Since China began its international adoption programs, infant mortality rates have plummeted for institutionalized children largely because of the generosity of adoptive parents to the homelands of their children via their agencies. Accordingly, the Proposed Regulations that will undoubtedly close agencies threaten the future of not only adoptive parents and potential adoptees, they threaten the lives of all of the children in the orphanages who will no longer enjoy the benefits of donations from an enormous pool of grateful new families around the world.

We believe that the proposed liability structure of the Hague Regulations will throw the baby out with the bathwater and go far beyond, and run counter to, the purpose of the Hague Convention. It will not only prevent the tragedies but it will destroy the ability of Americans who seek to grow their families through adoption to do so because they can't afford the cost of the few agencies that were able to stay in business. And, of course, imposition of these impossible standards will have a tragic effect on the very children who the agencies, and the drafters of the Hague legislation, seek to help.



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C. Proposed Alternative Solutions

The Hague Regulations can accomplish the purpose of the Hague Convention, and even some of the new purposes that apparently were added when drafting the Hague Regulations, by striking the following provisions:

- (i) Strike sections 96.45(b)(8) & (c) and 96.46(b)(9) & (c) - These are the key provisions which assign all risk between adoptive parents and their service providers to the service providers, and channel that liability to the primary providers;
- (ii) Strike section 96.39(d), which ties the agencies hands from sharing any risk within the process with adoptive parents by prohibiting informed waiver provisions. Waiver provisions should be permissible if the agencies educate their clients about known risks and parents knowingly decide to undertake such risk; and
- (iii) Strike section 96.33(h) - Requiring \$1,000,000 per occurrence of insurance coverage. Insurance at this level should not be a requirement unless the Department of State can propose a reasonable amount of coverage that is reasonably related to compensatory damages and will not encourage litigation, and until the Department of State can guaranty the availability and affordability of such policies.

As stated previously, the justifications for these provisions are accomplished effectively and appropriately by other provisions in the Regulations. The requirements of sections 96.45 and 96.46 (without sections 96.45(b)(8) and (c) and 96.46(b)(9) and (c)) accomplish effectively the drafters' desire to gain control and supervision over supervised providers here and abroad. The provisions are bolstered by Subsections J, K and M, which demand that all agencies conduct themselves with the highest of standards or risk losing their reputations or, worse, their licenses and/or accreditation.

The requirement for insurance coverage and prohibition against waivers forces the agencies to accept substantial risk that could effectively be spread throughout others in the process. Parents (of all income levels) should be able to consider international adoption as an affordable means of growing their families, and make a knowing decision whether to proceed in the face of uncontrollable world conditions. Agencies should be able to pursue their charitable purposes without the threat of constant litigation.

As an alternative solution, we propose that the Department of State consider asking the federal government to provide a market for international adoption professional liability insurance. It is our understanding that other federal insurance programs are offered in other contexts where it has been difficult for industries to obtain insurance. For instance, the National Flood Insurance Program allows the federal government to financially back programs while using insurance companies to process the



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policies. Implementing a system like that used in the flood insurance context may provide one solution that would allow agencies to carry insurance.

We further ask the Department to request that the insurance industry analyze underwriting international adoption insurance policies for parents to individually defray the known risks of international adoption. Insurers cover domestic adoption risks, as well as travel insurance risks. It is not a far stretch for insurance companies to cover the risks associated with foreign adoption and not unreasonable to ask that the parents pay insurance premiums if they want the added protection from financial loss in the event of a disappointing result. Indeed, the prevailing likelihood of successful adoptions may actually create a solid revenue opportunity for insurers and lessen the risk on the agencies. Ultimately, because of the spread of risk among parties in the process, the insurers may once again be willing and able to provide agencies with professional and directors and officers policies to agencies.

Finally, to the extent that the drafters wish to create some scheme that would allow financial compensation in the event of a tragic result, we believe that the agencies, under the administration of the State Department or some other governing body, might develop and implement a claims mechanism similar to what is used by other professionals in other industries. For example, many state bar associations have a Lawyers' Fund For Client Protection. Law firms remit annual "dues" and, basically, commit a predefined amount of resources to cover the misdeeds of the dishonest lawyer in the community. Of course, there would need to be a claims process that would require the claimant adoptive parent to demonstrate need, and a governing body to determine if the standards are met. But this may be a compromise with which the industry, the adoptive parents, and the needy children of the world can actually live.

II. Additional Comments Regarding Other Provisions of Proposed Regulations

Reaching Out further provides the following additional comments to the Proposed Regulations.

A. Extension of Comment Period and Interim Ruling/Publication/Comment of Proposed Regulations, as Revised

Reaching Out hereby requests that the Department of State extend the December 15, 2003 deadline for providing comments to the Proposed Regulations. While our agency and many involved with JCICS have been following closely the evolution of the Hague legislation and regulations, there are hundreds of agencies around the country that have only recently learned of the imminent legislative changes. Those agencies should be afforded more time to review the Proposed Regulations and determine how they will impact their agencies and their industry. Consideration of the input of more agencies will ensure the Proposed Regulations will be finalized with input from as many industry professionals as possible and that all relevant factors have been considered and evaluated.



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Moreover, Reaching Out requests that the next round of changes to the Proposed Regulations from the State Department be issued as an Interim Ruling, together with publication and an appropriate comment period. The current draft differs substantially from the Acton Burnell draft that has been circulating for the last several months, and raises entirely new issues that warrant a more thorough analysis and exchange of ideas.

B. Costs

Reaching Out would like the Department of State to consider the economic impact of the Proposed Regulations. Without factoring in the risk and liability issues and insurance requirements raised in Part I above, Reaching Out is concerned that the balance of the framework, while reasonable, will likely raise administrative costs substantially, which will, in turn be passed onto adoptive families. Some industry experts have estimated cost increases could be in the range of \$4,500 per case (\$3000 per case for accreditation purposes and another \$1,500 per case for additional work to maintain Hague standards on an ongoing basis). John Towriss, "The Hague: Noble Treaty or Flawed Concept," Adoption Today September 2003) (quoting Carl Jenkins, an attorney specializing in adoption law).

These costs will increase even further if and when agencies procure professional liability policies and if such policies would cover the acts of third party supervised providers, as suggested by the risk and liability provisions described above. See, Section I (A), above. One agency has done a comprehensive analysis on the subject and summarized its findings as follows:

"While the specifics of these policies and the scope of coverage offered vary, our experience highlights that despite our excellent record, reputation and "loss histories" and well drafted waiver provisions in our documents, a lawsuit, regardless of merit, can jeopardize an agency's ability to obtain coverage. If the proposed Hague regulations go into effect with the liability and risk allocation provisions in place, we question whether any insurance carrier will continue to write policies for our community and, if so, at what cost. The following reflects how this regulation will financially impact agencies of all sizes and adoptive families."

Current Yearly Cost of Obtaining New Insurance for One Million Dollars Coverage - Not including coverage for Homestudy agency or Foreign Partner. Annual Premium;	Divided by Number of Adoptive Families Per Year	Cost per Family
\$210,000	30	\$7000
\$210,000	100	\$2100
\$210,000	300	\$700
\$210,000	600	\$350
\$210,000	900	\$233



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Lillian Thogersen, World Association for Children and Parents, Email Memorandum Dated October 30, 2003 (copied with permission). The cost increase to be allocated to adoptive parents will clearly be substantial. Reaching Out fears that international adoption will become a privilege available only to the rich and elite while potentially wonderful parents of lesser means are foreclosed from the prospect of international adoption entirely due to cost.

C. Masters Degree

Section 96.37(f) of the Proposed Regulations requires that home study personnel have a minimum of a master's degree. Reaching Out believes that this provision will greatly restrict the qualified applicant pool for such positions since many geographic areas, particularly in rural parts of the country, do not have master's level candidates available to hire. Adoption is not a practice area that is taught in many programs, and most professionals learn primarily on the job through experience in the industry. While a master's degree may provide some helpful tools for social workers performing home studies, it does not provide a guaranty of appropriate knowledge on intercountry adoption, homestudies, or attachment disorders, etc.

Moreover, limiting home study personnel to master's level social workers will reduce the options that adoptive parents have in retaining a homestudy provider. Master's level social workers will be more expensive for agencies to hire and retain, and such costs will again be passed on to adoptive families. Finally, this provision can not be reconciled with 96.37(e) of the Proposed Regulations, which states a homestudy supervisor can have a bachelor's degree, as long as they also have appropriate other experience. Retention of these two provisions would have the incongruous result of requiring social work personnel to have a master's degree while their supervisors have a bachelors degree. For all of these reasons, Reaching Out believes that section 36.37(f) should be modified to track the requirements of 96.37(e), allowing social workers who perform home studies to have a bachelor's degree, provided they have prior experience in family and children's services, adoption or intercountry adoption.

D. Adverse Actions

Reaching Out further submits that Subpart K of the Proposed Regulations does not comply with the corresponding provisions in the IAA and does not afford agencies due process with respect to adverse actions issued by accrediting agencies. The IAA section 204(a)(1) states that the Department of State can suspend or cancel designation of accreditation status if it finds an agency to be "substantially out of compliance with the Convention, this Act, other applicable laws, or implementing regulations under this Act." IAA 204(a)(2). Further, an agency may be debarred if and only if it demonstrates a pattern of serious, willful or grossly negligent failures to comply or other aggravating circumstances indicated that continued accreditation or approval would not be in the best interests of the children or family concerned." IAA 204(c)(1).



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In contrast, the corresponding provisions in the Proposed Regulations set forth no threshold standards or guidelines to justify the imposition of adverse actions. Rather, the standards provide each accrediting entity no guidance whatsoever regarding which adverse actions to impose (suspension, cancellation of accreditation, non-renewal, or ceasing provision of services) under which circumstances. They simply state that the accrediting entity may "decide... based on the seriousness and type of violation" and on the extent to which the accredited agency corrected the deficiency. Section 96.76(a). Further, the Proposed Regulations permit an accrediting entity to impose adverse sanctions that require the agency to cease operations immediately, regardless of the merit of the cause for such action. Section 96.77(a). While the Proposed Regulations permit an accredited agency to respond to notice, Section 96.76(b), the agency will be forced to close its doors before it ever gets a chance to refute the charged deficiency.

Reaching Out requests that the Department of State modify the language of the Proposed Regulations to incorporate the standards and guidelines set forth in the IAA, and to further set forth which violations warrant imposition of which adverse actions. The process should be modified not only so it is fair to the agencies, but so it is consistently applied by various accrediting entities nationwide.

Finally, we respectfully request that the Department delineate standard and specific procedures that accrediting entities must follow to afford agencies with due process of law. Reaching Out requests that the procedures set forth time frames for adequate notice, response deadlines, standards of proof, and an administrative hearing board and procedures. Hearings should be held before an objective fact-finder and include procedures for expedited consideration, perhaps similar to hearings for temporary restraining orders/preliminary injunctions in order for an accrediting agency to have the authority to demand an agency cease operations. Moreover, the accrediting entity should be required to demonstrate a high threshold requirement, such as clear and imminent danger to a child at stake, to receive expedited consideration of the adverse action.

E. Post-Placement

As our final comment, we would ask that the Department of State, together with Congress, impose a statutory or regulatory framework that agencies can use to mandate that adoptive parents provide post-placement reports, in compliance with the requirements of the countries from which they adopt. To effectively accomplish the mandate of the Hague Convention, agencies need a means of securing their clients' future compliance with country requirements long after they have adopted their children. American agencies are forced to pay the price when adoptive parents choose to avoid such requirements by facing the threat of being foreclosed from future adoptions in such countries. American agencies are left with virtually no means of forcing their clients' compliance with country post-placement requirements, and contractual provisions have proven to be ineffective and difficult to enforce. Accordingly, Reaching Out respectfully requests that the Department of State, together with



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the legislature, take this issue into account when finalizing the regulatory framework that implements the Hague Convention.

Reaching Out appreciates the State Department's consideration of the issues raised herein, and looks forward to participating in a productive dialogue regarding our concerns.

Respectfully submitted,

Reaching Out thru International Adoption

Deborah E. Spivack, Esquire
Executive Director

Jeannene Smith, Founder



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Appendix

1. Section References:

a. Preamble V(c)(3). Subpart C – Accreditation and Approval –

- i. Pg – 54077- In deference to the historically important role the formation of networks and the use of small agencies and persons have played in providing services ...the Department has created regulations that allow such relationships among agencies to continue. The Department's goal is to mirror current practices and to provide regulatory flexibility so that the regulations do not negatively affect small agencies and person and other providers... sections 96.45(c) and 96.46(c) is that a primary provider must assume legal responsibility for the actions of supervised providers, both in the United States and overseas... (emphasis added).

b. Preamble V(c) (6) – Subpart F – Standards for Convention Accreditation and Approval

- i. Pg - 54081 – "...Input from congressional staff called for the regulations to assign civil liability to the accredited/approved provider for the acts of its U.S. supervised providers and its foreign supervised providers. To address these concern, the regulations made in sections 96.45(c) and 96.46(c) that any accredited agency, temporarily accredited agency, or approved person acting as the primary provider assume legal responsibility vis-à-vis the adoptive parents for the acts of other agencies and persons in the United States or abroad acting under its supervisions and responsibility, in addition to its own acts in connection with an adoption. The intend of this provision is to give the adoptive parents legal recourse against a single entity so far as is reasonable. The Department recognizes that this provision may raise the costs of liability insurance for accredited agencies and approved persons and have an effect on civil litigation. The Department is satisfied, however, that it is consistent with the intent and overall purpose of the IAA..." (emphasis added)
- ii. Pg 54082 – "...It seems also appropriate that, in tort, contract or similar legal action in which the performance of an adoption service provider is challenged, the primary provider should assume legal responsibility for the acts of supervised providers (domestic and foreign) that it has chosen to work with. The Department believes that the primary provider will do a better job of supervising if it is deemed automatically to be legally responsible for the acts of its supervised providers in both the accreditation and approval contact and with respect to tort, contract and similar civil claims."



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- iii. Pg. 54082 – The regulations require the agency or person to have a professional assessment of the risks it assumes, including the risk of assuming legal responsibility for the supervised providers in the United States and abroad, and to carry an amount of insurance that is reasonable related to that risk but in no event less than one million dollars per occurrence or claim. (emphasis added)
 - iv. Pg 54084 – This Preamble does not review all of the requirements contained in these sections, but generally the primary provider must... (1) Screen supervised providers to ensure that they have a general understanding of the Convention and its requirements; (2) before entering into an agreement for the provision of adoption services, obtain information about the supervised provider's history of practice and suitability to provider services consonant with the Convention...
 - v. Pg 54084 – The primary provider is responsible for ensuring that the supervised providers with whom it chooses to work comply with these requirements. Failure to do so may be grounds for adverse action against the primary provider and may jeopardize its accreditation or approval status. (emphasis added).
 - c. Subpart F – Standards for Convention Accreditation and Approval
 - i. Section 96.33(h) – Budget, audit insurance and risk assessment requirements
 - ii. Teamleader – Michael Phenner –
 - iii. “The agency or person maintains insurance in amounts reasonably related to its exposure to risk, including the risks of providing services through supervised providers, but in no case in an amount less than \$1,000,000 per occurrence.”
 - d. Subpart F – Standards for Convention Accreditation and Approval
 - i. Section 96.39(d) – Information disclosure and quality control practices
 - ii. Pg - 54103 – “The agency or person [may] not require a client or prospective client to sign a blanket waiver of liability in connection with the provision of adoption services in Convention cases.”
 - e. Subpart F - Standards for Convention Accreditation and Approval
 - i. Section 96.45(b)(8) and (c)(1) -
 - ii. pg - 54105 – “the agency... when acting as the primary provider and using supervised providers to provide adoption services, ensures that each supervised provider “operates under a written agreement with the primary provider that ... provides that the primary provider will retain legal responsibility for each case in which adoption services are provided, as required by paragraph (c)...
- c – The Agency or person, when acting as the primary provider and using supervised providers in the United States to provide adoption services, does the



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following in relation to risk management: (1) assumes tort, contract, and other civil liability to the prospective adoptive parent(s) for the supervised provider's provision of the contracted services and its compliance with the standards in this subpart F; and (2) maintains a bond, escrow account or liability insurance in an amount sufficient to cover the risks of liability arising from its work with supervised providers... (emphasis added).

I. Subpart F – Standards for Convention Accreditation and Approval

i. Section 96.46(b)(9) and (c)

- ii. Pg - 54106 – "...The agency ...when acting as the primary provider and using foreign supervised providers to provide adoption services in other Convention countries, ensures that each foreign supervised provider operates under a written agreement with the primary provider that "provides that the primary provider will retain legal responsibility for each case in which adoption services are required, as required by paragraph © of this section

(c) The agency or person, when acting as the primary provider and using foreign supervised providers to provide adoption services in other Convention countries, does the following in relation to risk management: (1) Assumes tort, contract and other civil liability to the prospective adoptive parent(s) for the foreign supervised provider's provision of the contracted adoption services and its compliance with the standards in this subpart F; and (2) Maintains a bond, escrow account or liability insurance in an amount sufficient to cover ther isks of liability arising from its work with foreign supervised providers."